East Coast Economic Region Development Council v Inai Kiara Sdn Bhd & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1048–05 OF 2018, W-02(IM)(NCVC)-1049–05 OF 2018, W-02(IM)(NCVC)-1050–05 OF 2018 AND W-02(IM)(NCVC)-1488–07 OF 2018

ABDUL RAHMAN SEBLI, SURAYA OTHMAN AND STEPHEN CHUNG JJCA

22 MARCH 2019

Civil Procedure — Abuse of process — Action — Respondents after failing in first suit to prevent appellant from calling on performance bond prayed for same relief in new suit against the appellant — New suit filed after respondents applied to withdraw first suit with liberty to file afresh but court struck it out instead — Whether respondents abused process of court and breached doctrine of res judicata by seeking to re-litigate issues/facts or cause of action that were/could have been raised in first suit — Whether since facts and issues raised in both suits were the same respondents should have amended pleadings in first suit to allege that terminated contract between parties had been reinstated — Whether respondents failed to prove appellant's call on performance bond was wrong or unconscionable

The appellant appointed the respondents to carry out a project ('the contract'). In accordance with the terms of the contract, the respondents provided a bank guarantee/performance bond in favour of the appellant issued by Malayan Banking Bhd ('Maybank'). About three years into the project, Maybank appointed a receiver and manager ('R&M') for the first respondent. This caused the appellant to terminate the contract and demand payment under the performance bond. The respondents applied to the High Court ('the Kuantan Suit') to, inter alia, declare the termination unlawful and restrain the appellant and Maybank by way of injunction from acting on the bank guarantee. In response, the appellant applied to stay the suit pending arbitration of the dispute between the parties. The High Court refused to grant the interim injunction sought but stayed the suit pending arbitration. The respondents thereafter negotiated with the appellant to reinstate the contract but the appellant was adamant that the respondents vacate the project site together with its equipment and machinery. The appellant later appointed a new contractor to complete the project. The respondents, meanwhile, applied to discontinue the Kuantan Suit with liberty to file afresh but on hearing the appellant's objection thereto, the court struck out the suit instead. The respondents then filed another suit against the appellant ('the KL Suit'), this time for, inter alia, a declaration that the contract had been reinstated following negotiations and was binding on the parties. The respondents also sought an

order for specific performance of the allegedly reinstated contract and an injunction to restrain the appellant from calling on the performance bond pending disposal of the suit. The High Court ruled that the appellant's call on the performance bond was unconscionable because the contract was terminated solely on the ground that Maybank had appointed a R&M for the first respondent, which appointment had been subsequently withdrawn. The court therefore granted the injunction sought and dismissed the appellant's application to set it aside. It also allowed the respondents' application to expunge certain letters marked as 'without prejudice' exhibited in the appellant's affidavit used in the injunction proceedings. The appellant's application to stay the proceedings pending arbitration was dismissed. The appeals herein were against the aforesaid decisions of the High Court. At the hearing of the appeals, the appellant argued that the terminated contract was never reinstated; that its call on the bank guarantee was proper and not unconscionable; that the injunction was wrongly granted; and that the KL Suit was not maintainable on the ground of abuse of process and/or res judicata because it sought to re-litigate issues and facts which had been raised in the Kuantan Suit.

Held, allowing the appeals and setting aside the decisions of the High Court:

(1) In the facts and circumstances of the case, the respondents had abused the process of court by again applying, in the KL Suit, for an interim injunction to restrain the appellant from calling on the bank guarantee. When their application for the same relief was dismissed in the Kuantan Suit and the proceedings were stayed pending arbitration, the respondents did not appeal against those decisions. Instead, they applied to discontinue the Kuantan Suit with liberty to file afresh and when the court struck out the suit instead, again there was no appeal against that decision. A week later, they filed the KL Suit based on the same facts. As the causes of action and the issues in both the suits arose out of the same sets of facts, the respondents could have applied to amend their pleadings in the Kuantan Suit to include the allegedly reinstated contract but they did not do so. The High Court erred in holding that it was not possible for the respondents to amend their cause of action in the Kuantan Suit to include the reinstatement agreement and that the cause of action in that suit was different from the one in the KL Suit. The doctrine of res judicata was not confined to causes of action or issues which the court was actually asked to decide or had already decided but it also covered causes of action or issues or facts which were so clearly part of the subject-matter of the litigation and clearly could have been raised, that it would be an abuse of process of court to allow a new proceeding to be started in respect of them (see paras 34–36).

(2) On the affidavits, there was no evidence that the appellant's call on the bank guarantee was unconscionable. Nor was there any evidence of

complicity between the appellant and Maybank. Under cl 37.5 of the contract, if a contractor's employment was terminated under cl 51, the performance bond or any balance thereof shall be forfeited. The appellant terminated its contract with the respondents pursuant to cl 51 and called upon the performance bond under cl 37. The demand on the bond was made before the negotiations to reinstate the contract began. The respondents did not plead fraud or unconscionability and also did not establish a strong prima facie case that the call on the guarantee was unconscionable. The High Court failed to appreciate the evidence and principles applicable and erred in dismissing the appellant's application to set aside the injunction that was granted to the respondents (see paras 40 & 43).

(3) The balance of convenience did not favour the respondents. The appellant was a statutory body established under the East Coast Economic Region Development Council Act 2008. There was no evidence the appellant was not financially sound or would be unable to pay back the monies under the performance bond or that the arbitration might become nugatory. The claim against the appellant was for breach of contract and if the respondents succeeded in their claim, damages were an adequate remedy. Therefore, the injunction should not have been granted. The respondents also did not sue or join Maybank as a party nor did they apply to restrain Maybank from paying out under the guarantee. In that sense, the interlocutory injunction was of no effect or was academic (see para 42).

(4) The High Court erred in expunging the four letters exhibited in the appellant's affidavit and in finding that those letters contained genuine proposals to settle the dispute between the parties. The letters did not show any intention on the appellant's part to settle with the respondents. It was clear from the letters that the respondents had accepted the fact that the contract had been terminated and that the appellant was not interested in settlement. The letters did not discuss about the parties trying to settle their dispute in respect of the termination of the contract or the about its reinstatement; instead, they were about returning monies and vehicles. If the letters showed that the appellant had rejected the respondents' claim and had no intention to negotiate, then the privilege of 'without prejudice' attaching to the letters did not arise (see paras 44 & 49–51).

(5) The High Court should have granted the appellant's application to stay the KL Suit pending arbitration of the dispute over whether the terminated contract had been reinstated and was binding on the parties. The judge had misdirected himself with regard to cl 54 of the contract which led him to incorrectly dismiss the stay application (see paras 53–58).

[Bahasa Malaysia summary

Perayu telah melantik responden untuk menjalankan satu projek ('kontrak tersebut'). Selaras dengan terma kontrak tersebut, responden telah memberikan jaminan bank/bon pelaksanaan yang memihak kepada perayu yang diberikan oleh Malayan Banking Bhd ('Maybank'). Tiga tahun semasa projek sedang dijalankan, Maybank telah melantik seorang penerima dan pengurus ('R&M') untuk responden pertama. Ini menyebabkan perayu untuk membatalkan kontrak tersebut dan menuntut pembayaran dibawah bon pelaksanaan tersebut. Responden memohon kepada Mahkamah Tinggi ('Guaman Kuantan') untuk, antaranya, pengisytiharan bahawa penamatan tersebut adalah salah di sisi undang-undang dan untuk menghalang perayu dan Maybank melalui satu injunksi untuk bertindak atas jaminan bank tersebut. Perayu pula memohon untuk menangguhkan guaman tersebut sehingga penyelesaian timbangtara. Responden selepas itu berunding bersama perayu untuk mengekalkan kontrak tersebut akan tetapi perayu bertegas bahawa responden dan peralatan dan jenteranya mengosongkan tapak projek tersebut. Perayu kemudiannya melantik satu kontraktor baru untuk menyelesaikan projek tersebut. Responden, sementara itu, telah memohon untuk menghentikan Guaman Kuantan dengan kebebasan untuk memfailkan semula tetapi selepas mendengar bantahan perayu, mahkamah telah membatalkan guaman tersebut. Responden telah kemudiannya memfailkan satu lagi guaman terhadap perayu ('Guaman KL'), kali ini untuk, antaranya, satu deklarasi bahawa kontrak tersebut telah dikembalikan lanjutan rundingan dan mengikat pihak-pihak. Responden juga memohon untuk satu perintah pelaksanaan spesifik untuk kontrak yang dikatakan telah dikembalikan semula dan satu injunksi untuk menghalang perayu daripada memohon untuk pelaksanaan bon perlaksanaan menantikan penyelesaian guaman tersebut. Mahkamah Tinggi memutuskan bahawa permohonan perayu atas bon pelaksanaan tersebut tidak berpatutan kerana kontrak tersebut telah dibatalkan hanya atas alasan Maybank telah melantik R&M untuk responden pertama, yang mana pelantikan tersebut telah kemudiannya ditarik balik. Mahkamah oleh itu membenarkan injunksi yang dipohon dan mengetepikan permohonan perayu untuk mengetepikannya. Mahkamah Tinggi juga membenarkan permohonan responden untuk memadamkan beberapa surat yang ditandakan 'tanpa prejudis' yang diekshibitkan di dalam afidavit perayu yang digunakan dalam prosiding injunksi. Permohonan perayu untuk menangguhkan prosiding, menantikan penyelesaian timbangtara telah ditolak. Rayuan disini adalah terhadap keputusan mahkamah tinggi yang dinyatakan di atas. Sewaktu pendengaran rayuan, perayu menghujahkan bahawa kontrak yang dibatalkan tidak pernah dihidupkan semula; panggilan jaminan banknya adalah teratur; injunksi tersebut diberikan secara salah; dan Guaman KL tidak boleh diteruskan atas alasan ianya merupakan satu penyalahgunaan proses dan/atau res judicata kerana ianya cuba untuk melitigasikan semula isu dan fakta yang telah ditimbulkan dalam Guaman Kuantan.

Diputuskan, membenarkan rayaun dan mengetepikan keputusan Mahkamah Tinggi:

(1) Berdasarkan fakta dan keadaan kes, responden telah menyalahgunakan proses mahkamah dengan memohon sekali lagi, dalam Guaman KL, untuk satu injunksi interim untuk menghalang perayu dari memanggil jaminan bank tersebut. Apabila permohonan mereka untuk relif yang sama diketepikan dalam Guaman Kuantan dan prosiding ditangguhkan menantikan timbangtara, responden tidak merayu atas keputusan tersebut. Sebaliknya, mereka memohon untuk tidak meneruskan Guaman Kuantan dengan kebebasan untuk memfailkan semula, dan apabila mahkamah membatalkan tuntutan tersebut, dan sekali lagi tiada rayuan terhadap keputusan tersebut. Seminggu selepas itu, responden telah memfailkan Guaman KL berdasarkan fakta yang sama. Memandangkan kausa tindakan dan isu dalam kedua-dua guaman timbul daripada fakta yang sama, responden boleh memohon untuk meminda plidingnya dalam Guaman Kuantan untuk memasukkan pengataan bahawa kontrak dikembalikan semula namun mereka tidak berbuat sedemikian. Mahkamah Tinggi terkhilaf dalam memutuskan perjanjian untuk mengembalikan semula dan kausa tindakan dalam guaman itu berbeza dengan Guaman KL. Doktrin res judicata tidak terhad kepada kausa tindakan atau isu atau fakta yang secara jelas merupakan hal perkara litigasi tersebut dan dengan nyata akan ditimbulkan, ianya merupakan satu penyalahgunaan proses mahkamah untuk membenarkan satu prosiding baru dimulakan (lihat perenggan 34–36).

(2) Berkenaan dengan afidavit, tiada keterangan bahawa panggilan perayu keatas jaminan bank tidak munasabah. Tiada juga apa-apa keterangan yang menunjukan persubahatan antara perayu dan Maybank. Di bawah klausa 37.5 kontrak, sekiranya penggajian kontraktor ditamatkan di bawah klausa 51, bon pelaksanaan atau apa-apa baki akan hilang. Perayu menamatkan kontraknya dengan responden selaras dengan klausa 51 dan memanggil bon pelaksanaan di bawah klausa 37. Tuntutan berkenaan dengan bon tersebut dibuat sebelum rundingan untuk mengembalikan semula kontrak bermula. Responden tidak memplidkan fraud atau tidak munasabah dan juga tidak mengemukakan kes prima facie bahawa pemanggilan jaminan tersebut tidak munasabah. Mahkamah Tinggi gagal untuk mengamati keterangan dan prinsip-prinsip terpakai dan terkhilaf dalam membatalkan permohonan perayu untuk mengetepikan injunksi yang dibenarkan kepada responden (lihat perenggan 40 & 43).

(3) Imbangan kesenangan tidak memihak kepada responden. Perayu merupakan badan berkanun yang ditubuhkan dibawah Akta Majlis Pembangunan Wilayah Ekonomi Pantai Timur 2008. Tiada keterangan

bahawa perayu tidak mempunyai keupayaan kewangan atau tidak boleh membayar balik wang di bawah bon pelaksanaan atau timbangtara tersebut mungkin menjadi tidak berguna. Tuntutan terhadap perayu adalah berkaitan dengan pelanggaran kontrak dan sekiranya responden berjaya dengan tuntutan mereka, ganti rugi merupakan satu remedi yang memadai. Oleh itu, injunksi tersebut tidak sepatutnya dibenarkan. Responden juga tidak menyaman atau menyatukan Maybank sebagai pihak dan juga tidak memohon untuk menghalang Maybank daripada membuat bayaran di bawah jaminan. Dalam keadaan tersebut, injunksi interlukotori tiada kesan dan adalah akademik (lihat perenggan 42).

(4) Mahkamah Tinggi terkhilaf dalam memadamkan empat surat yang diekshibitkan dalam afidavit perayu dan dalam mendapati bahawa surat tersebut mengandungi cadangan tulen untuk menyelesaikan pertelingkahan antara pihak-pihak. Surat tersebut tidak menunjukan apa-apa niat pada pihak perayu untuk membuat penyelesaian dengan responden. Adalah jelas daripada surat tersebut bahawa responden telah menerima fakta bahawa kontrak tersebut telah ditamatkan dan perayu tidak berminat dengan penyelesaian. Surat-surat tersebut tidak membincangkan pihak-pihak cuba untuk menyelesaikan pertelingkahan mereka berkenaan dengan penamatan atau mengembalikan semula kontrak; sebaliknya, ianya berkenaan dengan pemulangan wang dan kenderaan. Sekiranya surat menunjukan bahawa perayu telah menolak tuntutan responden dan tiada niat untuk berunding, maka, keistimewaan 'tanpa prejudis' berkenaan dengan surat tersebut tidak lagi timbul (lihat perenggan 44 & 49–51).

(5) Mahkamah Tinggi sepatutnya membenarkan permohonan perayu untuk menangguhkan Guaman KL menantikan timbangtara pertelingkahan berkenaan sama ada kontrak yang dibatalkan telah dikembalikan semula dan mengikat pihak-pihak. Hakim telah tersalah arah berkaitan dengan klausa 54 kontrak yang menyebabkan dia telah secara salah mengetepikan permohonan penangguhan (lihat perenggan 53–58).]

Notes

For a case on action, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 12.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, FC (refd)

Bocotra Construction Pte Ltd v AG [1994] 3 SLR(R) 723 (refd)

CE Ling Shipbuilding Sdn Bhd v Hoe Seng Huat Hardware Co (Pte) Ltd [2003] MLJU 775; [2004] 6 CLJ 145, HC (refd)

Deutsche Ruckversicherung v Walbrook Insurance Co Ltd & Ors [1995] 1 WLR 1017, QBD (refd)

Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors [1999] 5 MLJ 449, HC (refd)
Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149, SC (refd)
Henderson v Henderson [1843–60] All ER Rep 378 (refd)
Howe Richardson Scale Co Ltd v Polimex-Cekap and National Westminster Bank Ltd [1978] 1 Lloyd's Rep 161, CA (refd)
KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2012] MLJU 1218; [2013] 1 CLJ 993, HC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 6 MLJ 342, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)
LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle In Sdn Bhd [2000] 3 MLJ 339, CA (refd)
Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527; [1994] 1 CLJ 264, HC (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17, FC (refd)
N Balasingam v Singapore Airlines Ltd & Anor [1993] 1 CLJ 67 (refd)
Nicholson v Southern Star Fire Insurance Co Ltd (1927) 28 SR (NSW) 124, SC (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)
Rush & Tompkins Ltd v Greater London Council and another [1988] 3 All ER 737; [1989] AC 1280, HL (refd)
South Shropshire District Council v Amos [1987] 1 All ER 340, CA (refd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)
Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (t/a Sin Kwang Wah) [2000] 2 SLR 750, CA (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

Rules of Court 2012 O 29 r 2A

Appeal from: Suit No WA-22NCVC-621–11 of 2017 (High Court, Kuala Lumpur)

Cyrus Das (T Kuhendran and Farah Shuhadah Razali with him) (Zul Rafique & Partners) for the appellant.
Yap Boon Hau (Kamraj Nayagam and Phoebe Ng Kui Min with him) (Mah-Kamariyah & Philip Koh) for the respondents.

Stephen Chung JCA (delivering judgment of the court):

THE APPEALS

[1] The respondents formed a joint venture company (Inai Kiara-Hwa Chi JV) to undertake a project known as the 'Proposed Construction and Completion of Breakwater for the New Deep Water Terminal at Kuantan Port, Pahang' for the East Coast Economic Region Development Council (ECERDC) ('the appellant') pursuant to a contract dated 23 July 2013.

[2] By a notice dated 25 November 2016, the appellant terminated the contract. By a notice, on the same date, the appellant called upon Malayan Banking Bhd ('Maybank') to pay a sum of RM40,416,511.11 under a bank guarantee as stipulated in the contract.

[3] On 9 November 2017 the respondents filed Kuala Lumpur High Court Suit No WA-22NCvC-621–11 of 2017 ('the KL Suit') against the appellant, including for a declaratory order that the contract was reinstated and binding on the parties and for specific performance and injunctive relief.

[4] The next day, by encl 5, the respondents applied for an interim injunction to restrain the appellant from effecting any claim against the bank guarantee until the disposal of this suit and was granted an ex parte injunction. By encl 10, the appellant applied to set aside the ex parte injunction. At the inter partes hearing, the learned judge allowed encl 5 ('Appeal No 1050') and dismissed encl 10 ('Appeal No 1049'). Hence these two appeals.

[5] By an originating summons (encl 35), the respondents applied to expunge certain letters marked 'without prejudice' which were referred to and annexed as exhibits in the affidavit of one Arizan bin Arifin, affirmed on behalf of the appellant, to be used in encls 5 and 10. The learned judge allowed the OS application. The appellant has filed an appeal against that decision. This is Appeal No 1048.

[6] By encl 22, the appellant applied to stay the proceedings of this suit pending reference of the parties' disputes to arbitration. The learned judge dismissed the application. The appellant filed an appeal ('Appeal No 1488') against that decision.

[7] The parties agreed that the four appeals be heard together and that parties would submit on Appeals 1049 and 1050 together first and then submitted on Appeal 1048 and Appeal 1488.

A BACKGROUND FACTS

[8] By a letter of acceptance, dated 19 March 2013, and a contract, dated 23 July 2013, the respondents were appointed the contractor for the project. Clause 51 of the contract required the respondents to provide a performance bond equivalent to 5% of the total contract sum of RM808,330,222.20 by way of an irrevocable and unconditional bank guarantee for the due performance and observance of the contract and this was provided via a Maybank bank guarantee in the sum of RM40,416,511.11.

[9] The project commenced in April 2013. By a notice, dated 15 November 2016, Maybank appointed Duar Tuan Kiat of Messrs Ernst & Young as the receiver and manager ('R&M') of the first respondent.

[10] Pursuant to the notice to appoint the R&M, on 25 November 2016 the appellant gave notice to terminate the contract pursuant to cl 51.2 of the contract and gave notice to demand payment of the sum of RM40,416,511.11 under the bank guarantee.

[11] On 30 November 2016 the respondents filed an originating summons (OS No 24NCvC-349–11 of 2016) in the High Court, Kuantan ('the Kuantan Suit') against the appellant for unlawful termination of the contract and for an injunction to restrain the appellant from effecting the demand for payment under the bank guarantee. On the same day, the respondents filed and obtained an ex parte injunction restraining the appellant and Maybank from effecting the notice of demand. The appellant also filed an application to stay the proceedings pending reference to arbitration.

[12] At the inter partes hearing, the High Court dismissed the respondents' application for interim injunction and allowed the appellant's application for stay of the proceedings under s 10 of the Arbitration Act 2005.

[13] The parties subsequently entered into negotiations through an intermediary (Minister of Finance II) to formulate the terms and conditions to reinstate the contract (reinstatement agreement). One of the terms and conditions was that the appointment of the R&M be uplifted by 10 February 2017. By a letter dated 7 March 2017, Messrs Ernst & Young confirmed that Duar Tuan Kiat had ceased to be the R&M.

[14] The appellant issued a notice, dated 25 April 2017, for the respondents to remove the equipment and machinery from the site. On 7 July 2017 the appellant appointed a new contractor to complete the project. The respondents then filed the KL Suit seeking for declaratory orders.

OUR DECISION

[15] We have read and heard the submissions and the case authorities cited by the parties. Instead of setting out the submissions, we shall deal with these submissions in our decision.

[16] In applying to set aside the injunction, the appellant raised three issues:

(a) that the respondents failed to make full and frank disclosure of all matters which were material to the proceedings and which were or may be in favour of the appellant;

(b) that the respondents' claim amounted to abuse of process and ought to be barred due to res judicata in the broader sense; and

(c) that the learned judge erred in applying the relevant laws to the facts.

[17] Counsel for the appellant submitted it is trite that in an ex parte application, an applicant is legally bound to disclose to the court all matters which are within their knowledge that are material to the proceedings and which are and/or may be in favour of the absent party. There was utter failure on the part of the respondents to highlight the material facts to the learned judge that the respondents failed and/or neglected to raise the issue on the alleged existence of the purported reinstatement agreement before the Kuantan High Court during the Kuantan Suit and the fact that the respondents actually attempted to discontinue the Kuantan Suit with liberty to file afresh but was withdrawn and struck off on 1 November 2017 after the defendant objected to the same.

[18] It was submitted that if the learned judge had properly considered the facts presented by the appellant and the contents and true nature of the Kuantan Suit, he would have undoubtedly reached the irresistible conclusion that the respondents' claim against the appellant amounted to abuse of process and ought to be barred due to res judicata in the broader sense.

[19] The appellant submitted that the respondents alleged that the Kuantan Suit was premised on the unlawful termination of the contract by the appellant whereas the KL Suit is premised on the purported breach of the reinstatement agreement (which the appellant maintains do not exist in the first place) and that this was wholly misconceived because the parties in the Kuantan Suit are exactly the same as the parties in the KL Suit and the subject matter of the Kuantan Suit was premised on the same contract and/or facts in the KL Suit. It was argued that a plain reading of the relief prayed for in the Kuantan Suit and the ones sought in the KL Suit would show the net effect of both injunctive relief sought in the two suits are the same.

[20] The appellant submitted that the learned judge was plainly wrong in concluding that the respondents had duly complied with the provisions of O 29 r 2A of the Rules of Court 2012 and misapplied the law to the facts in dismissing the appellant's setting aside injunction application.

[21] On the performance bond, the appellant contended that it was an undisputed fact that the bank guarantee is an on-demand bank guarantee. Based on the authorities cited, the test that ought to be applied by the court is whether the party applying for an injunction can establish a strong prima facie case that there is fraud and/or unconscionability on the part of the beneficiary in calling the bank guarantee. There must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of and if so, the court will have to consider where the balance of convenience lies.

[22] The appellant submitted that the respondents' failure to allege fraud and/or unconscionability and their failure to provide any particulars or exhibits in support of their allegation was telling and the fact of the matter was that there was nothing unconscionable in the appellant's conduct against the respondents.

[23] The respondents submitted that it was pertinent to note that the respondents had abandoned prayer 1.1 of encl 5 which was for an injunction against the appellant's and/or the appellant's agents and/or appellant's adviser and/or appellant's consultants and/or appellant's employees and/or appellant's servants including any bank from taking any steps in accordance with or as a result of the notice of termination.

[24] It was submitted that Appeal 1050 and Appeal 1049 are apparently premised on the following grounds, summarily:

(a) there is no concluded reinstatement agreement;

(b) there is no issue of unconscionability in this case;

(c) bank guarantee is an on-demand bond which has been properly called;

(d) damages is an adequate remedy for the respondents;

(e) this suit is barred by the doctrine of res judicata and/or abuse of process due to the earlier Kuantan Suit; and

(f) no full and frank disclosure in an ex parte application.

[25] The respondents submitted that the position taken by the appellant in insisting on the termination of the contract and hence calling the performance bond without regard to the reinstatement agreement was unconscionable and

this became particularly apparent when a new contractor was appointed in July 2017 in place of the respondents while the reinstatement agreement was still alive and subsisting. This demonstrated the lacking of good faith on the part of the appellant.

[26] It was submitted that there was no abuse of process and that no issue of res judicata came into play. It was submitted that the learned judge had rightly and judicially exercised his discretionary power in granting the injunction whereby the appellant's refusal in recognising the reinstatement agreement and the subsequent conducts were found to be unconscionable and as such the decision in granting the interim injunction should not be disturbed. The purported non-disclosure of facts did not affect the learned judge's exercise of discretion in granting the injunction.

[27] On the first issue, it is trite that in an application for an interlocutory injunction, there must be full and frank disclosure. Failure to disclose material facts can be a ground to refuse the injunction: see *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527; [1994] 1 CLJ 264; *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316. As submitted above, the appellant contended that the respondents failed to disclose the purported reinstatement agreement before the Kuantan High Court during the Kuantan Suit and also failed to disclose that their application to discontinue the Kuantan Suit, but this time referring to the purported reinstatement agreement, with liberty to file afresh, was struck off. It was argued that in failing to make full disclosure, the respondents had distorted and gave a misleading picture of the relevant events leading to the grant of the ex parte order which the learned judge otherwise would not have made. On the other hand, the respondents submitted that the respondents in the affidavits in support of their application for the interim injunction had disclosed the Kuantan Suit and the reinstatement agreement which was annexed as exh GM11. In reply, the appellant countered that it was incumbent on the respondents in the ex parte application not only to make full disclosure but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made and that the respondents failed to satisfy the threshold.

[28] To begin with, we are of the view that the alleged failure to disclose the reinstatement agreement in the Kuantan Suit has no bearing on the KL Suit. The KL Suit in fact is premised on the reinstatement agreement which has been pleaded in the writ and statement of claim. In paras 15–17, 19–20, 22 and 26 of the affidavit in support of encl 5, the respondents have set out the material facts and exhibited the reinstatement agreement. These material facts were disclosed and before the learned judge when he heard the application for the interim injunction.

[29] In paras 9–14 of the grounds of judgment, the learned judge had directed himself whether the respondents had failed to make full and frank disclosure of material facts and the duty to draw attention to all relevant factors so as not to mislead the court during the ex parte application for the injunction. The learned judge then ruled that whilst the appellant may be right in contending that not each and every related fact was disclosed to the court for purposes of an ex parte application, the learned judge took the view that the purported non-disclosure was immaterial and would not have affected his exercise of discretion in granting the injunction.

[30] In exercising his discretion, the learned judge was entitled to take into account how innocent or culpable the non-disclosure. On the affidavits and submissions, there was no evidence that there was a deliberate non-disclosure or that there was a deliberate suppression of material facts which distorted the facts which misled the learned judge into making the decision which he otherwise would not have made: see *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 6 MLJ 342; *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (t/a Sin Kwang Wah)* [2000] 2 SLR 750. On the appeal record, the learned judge has correctly exercised his discretion as such: see *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150. We are of the view that there is no merit on this issue.

[31] In determining whether to grant an interim injunction, the court must consider: (a) whether there is a serious question to be tried; (b) whether damage is an adequate remedy; and (c) the balance of convenience or the justice of the case: *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. The appellant submitted that the respondents' claim and application for the interim injunction in the KL Suit tantamount to an abuse of process and ought to be barred by res judicata in the broader sense.

[32] Our first consideration is whether there is a serious question to be tried. The applications in the court below and the appeals before us are based on affidavit evidence, including the documents as exhibited. The facts are not in dispute. On 30 November 2016, the respondents filed the Kuantan Suit for a declaratory order that the appellant's termination of the contract was unlawful and applied for the interim injunction to restrain the appellant and Maybank from effecting the demand against the bank guarantee which was opposed by the appellant. On 4 January 2017 the appellant applied to stay the proceedings in the Kuantan Suit pending reference of the dispute to arbitration. On 30 October 2017 the respondents applied for leave to discontinue the suit with liberty to file afresh. On 1 November 2017, the Kuantan High Court dismissed the respondents' application for the interim injunction with costs, struck out the respondents' application to discontinue the suit and allowed the appellant's

application for stay with costs. About a week later, on 9 November 2017, the respondents filed the KL Suit. A

[33] It is clear that the respondents did not succeed in obtaining the interim injunction to restrain the appellant from effecting the demand against the bank guarantee and also could not proceed with the Kuantan Suit as it had been stayed pending reference to arbitration. The respondents did not appeal against those decisions. Instead the respondents applied for leave to discontinue the suit with liberty to file afresh which was struck out. Again there was no appeal against that decision. The respondents then filed the KL Suit against the appellant. The respondents contended that there is no abuse of process and that res judicata does not apply on the facts of the case. The respondents argued that the Kuantan Suit is in respect of the unlawful termination of the contract whereas the KL Suit is in respect of the reinstatement agreement and that there are two separate and different causes of action. B C D

[34] The respondents submitted that at the material time the reinstatement agreement was yet to be contemplated by the parties and hence no cause of action based on the reinstatement agreement. There is a fallacy in this submission. The reinstatement is to reinstate the contract terminated by the appellant following the notice issued by Maybank to appoint the R&M, which termination the respondents contended to be unlawful. Following the R&M notice, the appellant demanded payment under the bank guarantee pursuant to the contract and which the respondents complained to be unconscionable. Although the language used in the two suits may be slightly different, the causes of action and issues in both suits arose out of the same sets of facts. E F

[35] The facts showed that in December 2016 and January 2017 the parties were in negotiations to reinstate the contract. Subsequently, in April 2017, the appellant gave notice to the respondents to remove their machineries from the site and the appellant in July 2017 appointed a new contractor to complete the works under the contract. Therefore we agreed with the submission of the appellant that the respondents could have easily applied to amend the pleadings to incorporate the reinstatement agreement in the Kuantan Suit. Since April–November 2017, the respondents had ample time to amend the pleadings but did not do so. Further, the respondents chose to apply to discontinue the Kuantan Suit with liberty to file afresh which was struck out. As stated, there was no appeal against that decision. However, about a week later, the respondents filed the KL Suit based on the same facts which we considered to be an abuse of the process of court, bearing in mind the proceedings in the Kuantan Suit had been stayed pending reference of the dispute to arbitration. On the facts and the series of events, it is our considered view that the learned judge had misdirected himself on the facts and had erred in his findings that it was not possible for the respondents to amend the cause G H I

of action to include the reinstatement agreement and that the respondents' cause of action in the Kuantan Suit is different from the cause of action in the KL Suit.

[36] It has been held that when a matter between two parties and their privies has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata. The doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them: *Henderson v Henderson* [1843–60] All ER Rep 378; *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. The respondents' application for the interim injunction in the Kuantan Suit had been dismissed by the court. On the facts and circumstances of the case, it follows that the eespondents was abusing the process of the court in again filing the application for the interim injunction to restrain the appellant from effecting the demand under the bank guarantee in the KL Suit.

[37] The respondents had contended that the refusal of the injunction sought on the calling of the bank guarantee would affect their financial standing especially when the parties had agreed to reinstate the contract and should not be allowed to call on the guarantee. It was submitted the refusal of the injunction would allow the appellant who defaulted to enjoy the funds of the innocent party ie the funds of the respondents. It was contended that this amounted to unconscionable conduct. In his grounds of judgment, the learned judge stated that he was constrained to hold that the respondents had placed sufficient evidence before him to establish a strong prima facie case that the appellant had indeed acted in an unconscionable manner, inter alia, that the respondents' contract was terminated on the sole ground that a R&M had been appointed by Maybank which triggered the termination on 25 November 2016 and that the appellant remained silent when the respondents failed to procure the removal of the R&M on 10 February 2017. The learned judge went on to say that the reinstatement had neutralised the trigger effect. It must be noted that the respondents did not plead fraud or unconscionability.

[38] We refer to cl 37 of the contract which provides for the performance bond. Clause 37.1 provides that the contractor (ie the respondents) shall, as a condition precedent to the commencement of any work under this contract, deposit with the employer a performance bond equal to 5% of the contract sum for the due observance and performance of the contract. Clause 37.2 states

as follows:

> The Performance Bond shall be held or shall remain valid and effective for such period until the issuance of Final Certificate. The Performance Bond shall be from a licensed bank established in Malaysia and shall be irrevocable and payable forthwith on demand unconditionally, notwithstanding any objection, contestation, arbitration, legal proceedings or protest by the Contractor or any other third party and without any further proof or conditions and without any right of set-off or counterclaim.

[39] Reading cl 37.2, it is a pure on-demand guarantee. Such a performance bond is separate and independent of the underlying contract between the disputing parties and it is not open for the courts to inquire into any breach of obligations in the underlying contract except in clear cases of fraud and or unconscionability of which the bank has notice: see *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1.

[40] Under cl 37.5, in the event the contractor's employment is terminated under cl 51, the performance bond or any balance thereof shall be forfeited. As stated, the appellant had issued the cl 51 notice to terminate the contract following Maybank's notice to appoint the R&M and called upon the performance bond under cl 37. We do not wish to make any comment whether the notice to terminate is valid or otherwise which is pending arbitration. We take note that the demand on the performance bond was made on 25 November 2016 and the negotiations to reinstate the contract was subsequent to that.

[41] It has been held that in an application to restrain an on-demand performance bond, 'serious issue to be tried' is not one of the grounds upon which a court may grant an injunction against the beneficiary to stop payment by a bank under a performance bond: *Deutsche Ruckversicherung v Walbrook Insurance Co Ltd & Ors* [1995] 1 WLR 1017. The 'balance of convenience' principle is also not applicable: see *Howe Richardson Scale Co Ltd v Polimex-Cekap and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161; *LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle In Sdn Bhd* [2000] 3 MLJ 339. An ongoing arbitration between the parties is also not a reason to stop the call on the performance bond: *Bocotra Construction Pte Ltd v AG* [1994] 3 SLR(R) 723.

[42] Further, the balance of convenience is not in favour of the respondents. Firstly, the appellant is a statutory body established under the East Coast Economic Region Development Council Act 2008. There is no evidence that the appellant is not financially sound or unable to pay back the monies under the performance bond or that the appeal or the arbitration may become

A nugatory. Secondly, the claim against the appellant is for breach of contract. In April 2017, the appellant demanded the respondents to remove their machineries from site and in July 2017, the appellant had appointed a new contractor to complete the contract. In the event the respondents succeed against the appellant for breach of the contract, we are of the view that damages B is an adequate remedy and the injunction should not have been granted. Thirdly, the respondents did not sue or join Maybank as a party nor applied to restrain Maybank from making payment out on the bond once the call had been made. Since there is nothing to stop Maybank from paying under the bond, the respondents' application for the interlocutory injunction is in that C sense of no effect or academic.

[43] On affidavits, there is no evidence of any unconscionable conduct on the part of the appellant in demanding payment on the performance bond or D any complicity between the appellant and the bank. On affidavits, the respondents failed to establish a strong prima facie case that the appellant had acted in an unconscionable manner in calling upon the performance bond, bearing in mind that the respondents never pleaded fraud and or unconscionability. We are of the view that the learned judge had failed to E appreciate the evidence and the principles applicable. For the reasons given, we find that the learned judge had erred in dismissing the appellant's application to set aside the injunction and in granting the interlocutory injunction.

[44] In respect of Appeal 1048, as stated, the four letters complained of, to F be expunged, are annexed as exhibits to the affidavit of Arizan bin Arifin. The learned judge found that the four letters contained genuine proposals to settle the dispute between the parties but the parties did not reach any settlement be it on the termination or purported reinstatement agreement. He also ruled that the eespondents never consented and/or waived their right to the veil of G privilege at any point in time.

[45] The appellant submitted as follows:

H (a) the communications within the impugned letters were in fact not for the purpose of settling a dispute on whether there was a concluded reinstatement agreement;

(b) even if the impugned letters were truly communication made without prejudice, they fell within the exceptions to the 'without prejudice' rule I such that they ought to be made admissible;

(c) where the issue is whether there was a concluded agreement, the 'without prejudice' communications could be admitted as evidence so as to ascertain that;

(d) the appellant should be allowed to admit 'without prejudice' communications to correct a wrong assertion of fact; and

(e) in all the circumstances, the respondents have not shown that the matter was scandalous, irrelevant or otherwise oppressive.

[46] The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon public policy to encourage litigants to settle their disputes instead of going to trial: see *Rush & Tompkins Ltd v Greater London Council and another* [1988] 3 All ER 737; [1989] AC 1280. It is settled law that the heading 'without prejudice' does not conclusively or automatically render a document so marked privileged and to be inadmissible. If privilege is claimed but challenged, the court can look at the document so headed in order to determine its nature: see *South Shropshire District Council v Amos* [1987] 1 All ER 340; *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17; *CE Ling Shipbuilding Sdn Bhd v Hoe Seng Huat Hardware Co (Pte) Ltd* [2003] MLJU 775; [2004] 6 CLJ 145; and *N Balasingam v Singapore Airlines Ltd & Anor* [1993] 1 CLJ 67.

[47] The first letter, dated 26 May 2017, from the respondents to the appellant, stated that though they did not accept the termination, they proposed to bring an end to the contract by the parties to mutually agree to bring the contract to an end formally. In the second letter, dated 12 July 2017, in reply to the first letter, the appellant reiterated that the contract had been terminated by the notice dated 25 November 2016 and did not agree to the proposal. The third letter, dated 5 September 2017, from the respondents, proposed that the appellant released the sum under the last interim progress claim No 30, returned the sum under the bank guarantee and returned the vehicles of the respondents. The last letter, also dated 5 September 2017, in reply to the letter of even date, the appellant stated that the proposed terms were substantially almost the same as in the respondents' letter dated 26 May 2017 but nevertheless would forward the proposals to the Ministry of Finance for consideration.

[48] These four letters came after the appellant, by its notice dated 25 April 2017, demanded the respondents to remove their equipment and machineries from the site. The respondents by a letter dated 12 May 2017 then stated that they were rather surprised that the appellant chose to send the final reminder despite having agreed to reinstate the contract. The appellant replied to this letter, by its letter dated 19 May 2017, stating that it disputed all allegations made and that it consistently made clear that the termination of the contract on 25 November 2016 was valid. The three letters, dated 25 April 2017, 12 May 2017 and 19 May 2017 respectively, did not have the heading 'without prejudice'.

[49] Reading these letters and the respondents' letter dated 26 May 2017, the first letter to be expunged, which was in reply to the appellant's letter dated 19 May 2017, it was apparent that the respondents had accepted the fact that the contract had been terminated, that the respondents could no longer continue under the contract and reinstatement and instead asked for return of the monies and vehicles. For all intents and purposes, the said four letters did not discuss about the parties trying to settle the dispute in respect of the termination of the contract or the reinstatement agreement. Instead they were about returning the monies and vehicles after the appellant had terminated the contract and bearing in mind that the appellant had in July 2017 appointed a new contractor to complete the balance of the contract works.

[50] Reading the series of letters, there was no intention by the appellant to attempt settlement with the respondents in respect of the contract. It was also clear that the respondents had accepted the fact that the appellant was not interested in settlement. If the letters showed that the appellant had rejected the respondents' claim and there was no intention on the part of the appellant to negotiate, then the privilege of the 'without prejudice' letters did not arise: see *Nicholson v Southern Star Fire Insurance Co Ltd* (1927) 28 SR (NSW) 124: *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors* [1999] 5 MLJ 449.

[51] Further, when these applications came before the learned judge in the KL Suit, the Kuantan High Court had already made an order for the dispute between the parties to be referred to arbitration. There was no appeal against that decision. Whether the termination of the contract was valid and whether the four 'without prejudice' letters were admissible or otherwise should have been dealt with in the arbitration. For the reasons we have given, the learned judge should not have expunged the four letters and had erred as such.

[52] In respect of Appeal 1488, the appellant appealed against the decision of the learned judge in dismissing the appellant's application in encl 22 for stay of the KL Suit pending reference of the dispute in respect of the reinstatement agreement to arbitration.

[53] After hearing submissions of parties, in his grounds of judgment, the learned judge stated that from his reading of the arbitration agreement as expressed in cl 54.1, he found that the arbitration agreement did provide for reference to arbitration in cases of disputes which included matter arising after the termination of the contract, namely that this included the reinstatement agreement. Therefore he found that the reinstatement agreement came within the ambit of the arbitration agreement. He went on to say that he did not agree with the submission of the respondents that the appellant had taken steps in the proceedings for the reason that the appellant had no choice but to defend the respondents' application for interim injunction. So far, based on our reading of

cl 54 of the contract, we have no reason to quarrel with his reasons and findings as such. The respondents did not file any appeal or cross-appeal against the decision of the learned judge as such. A

[54] The learned judge then ruled that the appellant's application for stay pending arbitration could not be granted for the reason that the agreement to arbitrate as contained in cl 54 was inoperative due to the failure to nominate the name of the officer to which the dispute was to be referred to. He said it was apparent there is no officer named for purposes of referring the dispute or difference as required under cl 54.1 and the requirement of the appointment of the officer was a condition precedent which had not been complied. The appellant submitted that the name of the officer to which the dispute is to be referred to has been clearly spelled out in the contract namely, the CEO of ECERDC and that the learned judge had erred. This is the crux of the complaint of the appellant in this appeal. B C D

[55] Clause 54.1 provides that if any dispute or difference shall arise between the employer and the contractor, either during the progress or after completion of the works or after termination of the contractor's employment, or breach of contract then such dispute or difference shall be referred to the officer named in the appendix for a decision. E

[56] We refer to the appendix. The appendix sets out three columns; the first refers to cl 3.1(i), the second states 'Officer(s) empowered to take actions of the Employer in respect of Clauses 40, 51, 52, 54, 61 and 62' and the third column states 'CEO of ECERDC. Clause 3.1(i) states that notwithstanding any provision in this contract, it is hereby agreed that the right to take action or initiates proceedings on behalf of the employer in respect of any matters which arises out of the provisions of clause ... or 54 (Arbitration) ... is expressly reserved to the relevant officer or officers named in the Appendix hereto'. Reading the above, clearly the contract and the appendix thereto have provided for and named such an officer, namely the CEO of ECERDC. It is apparent the learned judge had misread or misdirected himself on cl 3.1(i), cl 54.1 and the appendix which led him to incorrectly rule that cl 54.1 is inoperative due to the failure to nominate and name such an officer to which the dispute is to be referred to. F G H

[57] Further, under cl 54.3, if the officer named in the appendix fails to give a decision for a period of 45 days after being requested to do so, either party may require such dispute or difference be referred to arbitration. The decision of this officer or his failure to give a decision is not a condition precedent and does not prevent either party to refer their dispute to arbitration because, under cl 54.5, the arbitrator shall have power to review and revise any certificate, opinion, decision and to determine all matters in dispute. I

[58] In the KL Suit, the respondents applied for a declaratory order that the contract was reinstated and for specific performance of the reinstated agreement. Whether the contract was reinstated and binding on the parties is a dispute that comes within the ambit of cl 54 of the contract and should have been referred to arbitration under s 10 of the Arbitration Act 2005: see *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2012] MLJU 1218; [2013] 1 CLJ 993; *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1. In this case, the appellant has applied for a stay of the KL Suit pending reference of the dispute to arbitration and the learned judge should have granted the stay to refer the dispute to arbitration. However the learned judge had misdirected himself on cl 54 of the contract and erred in dismissing the application.

[59] In conclusion, we find merits in all four appeals and we therefore allowed all four appeals and set aside the High Court's decision in all four appeals with costs to the appellant.

Appeals allowed; decisions of the High Court set aside.

Reported by Ashok Kumar